NO. 15-1140

In the
Supreme Court of the United States

MICHAEL BINDAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

DAVID W. SHAPIRO
BOERSCH SHAPIRO LLP
1611 Telegraph Avenue
Suite 806
Oakland, CA 94612

TED SAMPSELL-JONES
MITCHELL HAMLINE
SCHOOL OF LAW
875 Summit Avenue
St. Paul, MN 55105

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL D. LIEBERMAN
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

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REPLY BRIEF

This Court has repeatedly rejected novel interpretations of federal fraud statutes that sweep beyond "traditional concepts of property." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Yet the Second Circuit—in direct conflict with the Sixth and Ninth Circuits—has long endorsed an expansive and atextual "right-to-control" theory of fraud that is entirely unmoored from traditional concepts of property and instead treats the "withholding or inaccurate reporting of information that could impact on economic decisions" as sufficient. *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991); *but see United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (rejecting fraud based on "the ethereal right to accurate information"); *United States v. Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992) (right to control is "not 'property' of the kind that Congress intended to reach in the wire fraud statute"). Although the Second Circuit has clung to the *Wallach*/right-to-control theory despite numerous intervening Supreme Court cases undermining it, even it recognized this case "present[s] a substantial question" by granting a stay of the mandate and allowing Petitioner to remain free on bail pending this Court's review. Fed. R. App. P. 41(d)(2)(A).

Rather than defending *Wallach* or the right-to-control theory as a proper interpretation of the federal fraud statutes (a tall order to say the least), the United States devotes the bulk of its brief in opposition to arguing that this case was really about actual economic loss in the common-law sense. To the extent the government suggests that the proceedings below

required proof of actual loss, rather than the more amorphous, governing Second Circuit right-to-control standard, the government is wrong. The government requested (and received) a right-to-control jury instruction; presented extensive evidence about purported deprivations of the right to control; obtained a 12-year sentence based on a right-to-control theory; and defended the conviction on appeal based on *Wallach* and related right-to-control cases. As the *pièce de résistance*, the government successfully excluded as *irrelevant* the defendants' evidence disputing any actual economic loss.

And to the extent the government contends that it might have been able to prove (a relatively modest) actual loss to the insurers on the facts of this case, that is debatable but ultimately underscores the need for this Court's review. Why would any prosecutor in the Second Circuit ever go to the trouble of proving actual economic loss (and then be stuck with a low, concrete loss number for sentencing) when the "right to control" will do under well-established circuit precedent? The only alternative to business as usual in the Second Circuit is this Court's review. It is utterly intolerable that conduct that would be, at most, a breach of contract in Ohio or California can lead to 12 years of federal-prison time in New York, Connecticut, or Vermont. The petition should be granted.

I. Certiorari Is Warranted To Address The Validity Of The Expansive Right-To-Control Theory Of Fraud.

A. The Right-to-Control Theory Was Central to the Proceedings Below and is Squarely Presented for This Court's Review.

The government does not dispute that the Second Circuit has repeatedly endorsed the right-to-control theory of fraud. Nor does the government attempt to reconcile the right-to-control theory with this Court's precedents. Instead, the government's lead argument (at 15-21) is that this case was really all about "economic loss" or "economic harm" to the insurance companies. That argument is wrong on a number of levels.

1. Consistent with the conceded reality that the right-to-control theory is the governing law of the Second Circuit, that theory was central at each and every stage of the proceedings below. The government expressly stated before trial that it intended to prove a scheme "to deprive the Subject Insurers of the right to control their assets." DN 237 at 3. The government also announced that it did not intend to prove actual financial harm, but instead that "defendants contemplated harm … to the Subject Insurers' right to control their assets." DN 230 at 19.

Indeed, because the government relied on a right-to-control theory, it moved to exclude as *irrelevant* defendants' evidence showing that "the issuance of STOLI policies did not harm the Subject Insurers." *Id.* at 17. The district court granted that motion (over defendants' objection), holding that evidence showing

that "the Insurers suffered no financial loss—indeed, made millions of dollars, as a result of issuing the policies procured by misrepresentations" was inadmissible. C.A.App.290; *accord* C.A.App.293 (government need not show that insurers "found themselves in the red as a result of their involvement with STOLI policies").

At trial, the district court unquestionably instructed the jury on a right-to-control theory:

> [A] person is deprived of money or property when someone else takes his money or property away from him. But a person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property. *We referred to that as being deprived of the right to control money or property*.

Pet.App.39-40 (emphasis added). The government (at 16-17) focuses heavily on another sentence in the instruction stating that "loss of the right to control money or property constitutes deprivation of money or property only when the scheme, if it were to succeed, would result in economic harm to the victim." Pet.App.39. But just one sentence later—in language the government ignores—the district court emphasized that "[*e*]*conomic harm is not limited to a loss on the company's bottom line*." *Id.* at 40 (emphasis added).

The instructions were thus crystal clear that, consistent with longstanding Second Circuit precedent, Petitioner could be convicted of fraud if he deprived the insurance companies of "the ability to

make an informed economic decision," *regardless* of whether there was a "loss on the company's bottom line," *i.e.*, regardless of whether there was an actual or contemplated deprivation of "money or property" as required by the common law and this Court's precedents.[1]

The government doubled down on the right-to-control theory at sentencing by using inflated and artificial loss figures, rather than trying to estimate any concrete (and much smaller) amount of actual economic loss, to secure the extraordinary 12-year sentence imposed on Petitioner. The government argued that the relevant "loss" was not the marginal loss of profitability for STOLI policies vis-à-vis non-STOLI policies, but rather the *entire face value of the policies* (less any premiums paid). *See* DN 323 at 54-58. As the sentencing amply demonstrates, once you abandon common-law requirements that the victim suffer a concrete loss of money or property, there is precious little to constrain prosecutors' creativity in generating artificial and inflated

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[1] The government halfheartedly suggests (at 14-15 & n.2) that Petitioner forfeited his objection to the jury instruction because the parties jointly submitted the final instruction. But the final instruction was submitted only *after* the district court had rejected Petitioner's multiple challenges to being prosecuted under a right-to-control theory. *See, e.g.*, C.A.App.811-12 (denying motion for judgment of acquittal because "the loss of the right to control one's property constitutes tangible economic harm"). Even at the instructional stage, Petitioner requested language that would have required a showing of "actual economic harm" to the victims. DN 361 at 9. And the defendants acceded to the final jury instruction while preserving all previous objections "with particular emphasis on the right to control and the economic harm issue." C.A.App.895.

measures of the loss occasioned by "depriving the victim of its ability to make an informed economic decision." C.A.App.1620.

Finally, the government defended the convictions on appeal based on the right-to-control theory. Indeed, the government relied so heavily on *Wallach*—the Second Circuit's leading right-to-control case—in its appellate brief that it warranted a "*passim*" in the table of authorities. The Second Circuit, in turn, repeatedly cited *Wallach* and applied the governing right-to-control theory in affirming Petitioner's conviction. Pet.App.15, 25, 27, 29. After that decision, Petitioner expressly asked the full Second Circuit to overrule *Wallach*, align itself with this Court and the Sixth and Ninth Circuits, and disclaim the right-to-control theory. Although the Second Circuit retained *Wallach* and denied rehearing, it acknowledged the tension in the courts by staying its mandate and allowing Petitioner to remain free on bail while seeking this Court's review. In short, the right-to-control theory was central to this case at literally every stage of the proceedings, and the government blinks reality by suggesting otherwise.

2. To the extent the government suggests (at 2-3, 7, 20-21) that it could have proven economic loss in this case because the STOLI policies were "worth less to the insurers" than non-STOLI policies and that the companies were thus deprived of "economic value," that is both debatable and ultimately beside the point. It is certainly not possible to sustain the jury verdict on the ground that the jury actually found evidence of economic loss, when the jury was instructed that it need not find any actual or contemplated loss to the

insurers' "bottom line" and the defendant's contrary evidence showing no such loss was excluded *as irrelevant*.

But even if the government could have proven economic loss here, that is part and parcel of the problem. As long as the right-to-control theory remains the governing law of the Second Circuit, why would any prosecutor ever try to prove a true economic loss as required by the common law and this Court's precedents? It is one thing to sprinkle in a little evidence suggestive of economic loss as color (which is the most that can be said for the record here), but quite another to prove an actual amount of economic loss, which the prosecutors would then be stuck with at sentencing. Unless and until this Court intervenes, there will be no reason for prosecutors to prove an actual loss of money or property even in cases where they might be able to do so.

In all events, the government is wrong to suggest (at 2-3, 20-21) that it actually proved the insurers suffered "economic harm" in the common-law sense. All of the so-called "losses" or "harms" involved nothing more than the insurers selling policies at the prices they asked for. They "lost" only the incidental (and highly speculative) windfalls that might result from policies lapsing or policy owners under-enforcing their rights. That is not a deprivation of money or property in a common-law sense. *See Skilling v. United States*, 561 U.S. 358, 400 (2010) (property fraud occurs only when "the victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other"). If the insurers determined that individuals with financial advisors

were more likely to insist on their policy rights and thus deterred their efforts to purchase insurance, an effort to disguise the financial advisors' role might or might not violate the contract or state law, but it would not be federal criminal fraud.

B. The Right-to-Control Theory Has Divided the Circuits and Conflicts With This Court's Precedent.

1. The circuits are squarely split regarding the validity of the right-to-control theory. Pet.18-23; NACDL Br.10-11. In *Wallach*, the Second Circuit held that a conviction for federal criminal fraud may be "predicated on a showing that some person or entity has been deprived of potentially valuable economic information." 935 F.2d at 462-63. The Second Circuit has reaffirmed that core holding in numerous cases, including this one. *See* Pet.App.29 ("[I]t suffices to prove that the defendants' misrepresentations deprived the insurers of economically valuable information that bears on their decision-making."). In stark contrast, the Sixth and Ninth Circuits have held that a defendant cannot be convicted of fraud for depriving a counterparty of "the ethereal right to accurate information," which is "not the kind of 'property' right[] safeguarded by the fraud statutes." *Sadler*, 750 F.3d at 591; *accord Bruchhausen*, 977 F.2d at 468 (company's desire to avoid selling to disfavored purchaser not "'property' of the kind that Congress intended to reach in the wire fraud statute").

The government (at 24-26) attempts to distinguish *Sadler* and *Bruchhausen* on their facts on the ground that those cases, unlike this one, did not involve "economic loss" or deprivation of the "full

economic benefit of the bargain." But that is wrong for all the reasons set forth above. It may or may not be possible for the government to prove that dealing with disfavored purchasers like pill mills and illegal arms dealers causes actual economic loss. But there is no question that the government must prove just that in the Sixth and Ninth Circuits, while it can rely on the right-to-control theory when it comes to disfavored purchasers in the Second Circuit. Had this case arisen in the Sixth or Ninth Circuits, the government could not have excluded evidence related to actual financial harm (*i.e.*, harm to the "bottom line"); could not have obtained a jury instruction on the right-to-control theory; could not have based the amount of loss for sentencing on the entire face value of the policies (rather than the purported difference in value between a STOLI policy and a non-STOLI policy); and could not have defended the verdict on appeal by arguing that "property rights include … the 'right to control' one's assets," Br. for U.S. 52 (Feb. 3, 2015). From start to finish, this prosecution was grounded in a theory of fraud that has been thoroughly rejected by the Sixth and Ninth Circuits.

In sum, the only material difference between the decision below and *Sadler*/*Bruchhausen* is that the Second Circuit has held that "potentially valuable economic information" counts as "money or property," whereas the Sixth and Ninth Circuits have held it does not. In all three cases, the defendants deprived their counterparties of accurate information and thereby convinced them to sell to a disfavored purchaser, but only in the Second Circuit does that conduct, without proof of an actual or contemplated loss to the bottom line, amount to federal criminal fraud.

2. The right-to-control theory is fundamentally irreconcilable with this Court's precedents, most of which were decided unanimously. Pet.23-32; NACDL Br.5-10. In *Sekhar v. United States*, 133 S. Ct. 2720 (2013) (9-0), *Skilling*, 561 U.S. 358 (9-0 in relevant part), and *Cleveland*, 531 U.S. 12 (9-0), this Court held that terms in federal criminal statutes must be given their common-law meanings. There is no plausible argument that a right to "potentially valuable economic information" is consistent with the common-law meaning of property. Indeed, the courts that invented the right-to-control doctrine did so in order to "broadly and liberally" *expand* the fraud statutes beyond their common-law meaning. *See, e.g.*, *United States v. Mandel*, 591 F.2d 1347, 1360 (4th Cir. 1979). While other courts, like the Sixth Circuit in *Sadler*, have recognized that the right-to-control theory is out of step with the unmistakable trend of this Court's more recent cases, the Second Circuit has stuck to its guns.

The government's scattershot efforts (at 21-24) to distinguish *Cleveland*, *Skilling*, and *Sekhar* badly miss the mark. For the most part, the government just describes the facts of each case and then unhelpfully notes that this case involves different facts. But the government has no answer at all to the core legal arguments advanced in the Petition. The government does not attempt to explain how an inchoate and as-yet-unissued life insurance policy can be property "in the victim's hands," as required by *Cleveland*. 531 U.S. at 26. Nor does it make any effort to square Petitioner's conviction with *Skilling*'s holding that the fraud statutes do not reach "schemes of non-disclosure and concealment of material

information." 561 U.S. at 410. The government notes (at 21) that, unlike *Skilling*, it "did not proceed on an honest-services theory" in this case. But who needs "honest services" when you can rely on the deprivation of the right to control, which is even more amorphous than the theory soundly rejected in *Skilling*. And the government provides no explanation whatsoever of how the right to control the issuance of an insurance policy could constitute "obtainable" or "transferable" property, as required by *Sekhar*. 133 S. Ct. at 2724-26. This Court's precedents are crystal clear that the federal fraud statutes simply do not reach "schemes to deprive an individual or entity of amorphous, intangible property rights like the 'right to control.'" NACDL Br.4.

II. The Validity Of The Right-To-Control Theory Of Fraud Is An Important And Recurring Issue That Warrants Immediate Review.

Although the government now attempts to downplay the role that the right-to-control theory played in this case, federal prosecutors in jurisdictions within the Second Circuit have eagerly embraced that theory when prosecuting mail and wire fraud. *See, e.g.*, *United States v. Tagliaferri*, 2016 WL 2342712, at *4 (2d Cir. May 4, 2016); *United States v. Heinz*, 607 F. App'x 53, 54 (2d Cir. 2015); *United States v. Viloski*, 557 F. App'x 28, 33 (2d Cir. 2014); *United States v. Allen*, 2016 WL 615705, at *4 (S.D.N.Y. Feb. 16, 2016); *United States v. Carpenter*, 2015 WL 9305638, at *3 (D. Conn. Dec. 21, 2015). And why wouldn't they, given the relative difficulty of proving a concrete loss amount that would then constrain sentencing? It is

intolerable that a defendant in New York, Connecticut, or Vermont could face twelve years in federal prison for conduct that would be at most a matter for state contract law, or perhaps a state insurance regulator, in many other jurisdictions.

The right-to-control theory also exemplifies certain lower courts' continuing eagerness to stretch criminal statutes past their breaking points. *See* NACDL Br.11-15. This Court has repeatedly warned against such unrestrained readings of criminal statutes—both in general, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077 (2014), and with respect to the fraud statutes, *see supra* Part I.B. Yet the government (and the Second Circuit) have clearly failed to heed that message. This case presents an ideal opportunity for the Court to once again remind federal prosecutors and lower courts about "the deeply serious consequences of adopting … boundless reading[s]" of federal criminal statutes. *Bond*, 134 S. Ct. at 2090.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL D. LIEBERMAN
BANCROFT PLLC
500 New Jersey Avenue NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

DAVID W. SHAPIRO
BOERSCH SHAPIRO LLP
1611 Telegraph Avenue
Suite 806
Oakland, CA 94612

TED SAMPSELL-JONES
MITCHEL HAMLINE SCHOOL OF LAW
875 Summit Avenue
St. Paul, MN 55105

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